IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 16TH MARCH 2007 / 25TH PHALGUNA 1928

RSA.No. 106 of 2007()

AGAINST THE ORDER IN IA.1810/2006 IN
AS.153/2006 of VI ADDL.DISTRICT COURT, ERNAKULAM
OS.314/1998 of I ADDL.M.C.,ERNAKULAM

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APPELLANTS IN THE HIGH COURT/APPELLANTS IN THE LOWER APPELLATE COURT/AGGRIEVED PARTY

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1. VARGHESE, AGED 38 YEARS,
   S/O.JOHN, PARAPPATH HOUSE, PALLILAMKARA,
   THRIKKAKARA NORTH VILLAGE, H.M.T.COLONY (PO),
   KALAMASSERY.

2. SATHEESAN, AGED 37 YEARS,
   S/O.JANARDHANAN, PEZHUNGAL HOUSE,
   PALLILAMKARA, THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

3. P.V.SADANANDAN, AGED 42 YEARS,
   S/O.VELAYUDHAN, PONNETH HOUSE,
   PALLILAMKARA, THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

4. P.K.GIRISH, AGED 35 YEARS,
   S/O.KUMARAN, PLATHAZHATHU HOUSE,
   PALLILAMKARA, THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

5. MOHANAN, AGED 50 YEARS, S/O.VELU,
   PLATHAZHATHU HOUSE, PALLILAMKARA,
   THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

BY ADV. SMT.PRIYA DEVI.P

RESPONDENT/1ST RESPONDENT, RESPONDENTS 2 TO 4/PLAINTIFF & DEFENDANTS 2 TO 4:
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1. K.P.ARAVINDAKSHAN, S/O.PAPPU,
   KAZHANCHIKKATTU HOUSE, PALLILAMKARA,
   THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

2. A.V.PADMAJAN, S/O.VELAYUDHAN,
   EZHIPURATHU HOUSE, PALLIAMKARA,
   THRIKKAKKARA NORTH VILLAGE,
   H.M.T.COLONY (PO), KALAMASSERY.

3. A.V.LAKSHMANAN, S/O.VELAYUDHAN,
   EZHIPURATHU HOUSE, PALLIAMKARA,
   H.M.T.COLONY (PO), KALAMASSERY.

4. A.V.HARIDAS, S/O.VELAYUDHAN,
   EZHIPURATHU HOUSE, PALLIAMKARA,
   H.M.T.COLONY (PO), KALAMASSERY.

R1 PARTY IN PERSON
R2, R3 & R4 BY ADV. SRI.V.S.CHANDRASEKHARAN
SRI.K.P.ARAVINDAKSHAN

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 16/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.178/07 IN RSA 106/07

DISMISSED

16/3/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

R.S.A.NO.106 OF 2007

Dated 16th March 2007

J U D G M E N T

Appellants in A.S.153/06 on the file of District Judge, Ernakulam are the appellants. First respondent is the plaintiff and respondents 2 to 4 are the defendants. First respondent filed the suit seeking a decree for permanent prohibitory injunction and damages. Suit was filed against defendants in their representative capacity, after obtaining permission to them under Order I Rule 8 of Code of Civil Procedure effecting publication. Defendants resisted the suit contending that there is a path way which was being used by the people of the locality for more than 50 years and therefore first respondent is not entitled to the decree sought for. Learned Munsiff after framing necessary issues and examining PWs.1 to 3 and Dws.1 to 3 and marking Exts.A1 to A23, Exts.B1 and B2 and Exts.C1 and C2 and Exts.X1 and X2, upheld the case of first respondent and granted a decree on 30/10/2002. Appellants are not parties to

the suit though suit was in a representative capacity. Appellants filed A.S.153/06 along with I.A.1810/06, an application to condone the delay of 1157 days in filing the appeal. Appellants contended that they were not aware of the suit or the decree and came to know about the decree only when they received a notice from the executing court directing them to appear before the executing court in an application filed by first respondent for prosecuting them for violation of the decree for injunction. It was contended that there was no proper publication as provided under Order I Rule 8 of the Code of Civil Procedure and therefore they were not aware of the suit and decree and hence delay is to be condoned. Application was opposed by first respondent, who filed a detailed objection. Learned District Judge as per elaborate order dated 18/12/2006, dismissed the application to condone the delay holding that records of the trial court establish that there was proper publication and materials also establish that appellants were aware of the suit and the decree and therefore delay cannot be condoned. This second appeal is filed challenging the dismissal of A.S.153/06.

2. Learned counsel appearing for appellants and first respondent were heard.

3. Learned counsel appearing for appellants argued that there was no proper publication of notice as provided under Order I Rule 8 of the Code and appellants were not aware of the suit or the decree and they came to know about the decree only when they received notice in the execution petition calling upon them to appear before that court on 24/1/2005 and immediately certified copy was taken and appeal was filed and therefore first appellante court should have condoned the delay. It was argued that appellants only sought measurement of plaint schedule property and in such circumstances, first appellate court should have condoned delay and disposed appeal on merit. Learned counsel appearing for first respondent argued that appeal was filed when execution petition was filed and appellants were aware of the suit and the decree and learned District Judge rightly considered the question in the proper perspective and there is no reason to interfere with the dismissal of the appeal as no substantial question of law is involved.

4. Learned District Judge considered the

relevant aspects in the proper perspective and elaborately. Application was filed to condone the delay of 1157 days contending that appellants were not aware of the suit and the decree. Learned District Judge found that in the affidavit filed before the court, appellants did not disclose when exactly they received notice from the executing court and apart from stating that they came to know about decree only on receipt of notice directing them to appear before executing court. On perusing the records of trial court, in the light of the objections raised by first respondent that appellants were aware of suit, learned District Judge found that 4th appellant was one of the signatories to Ext.X1 petition marked in the suit. Learned District Judge also found that Ext.X2 was a petition filed by 70 persons requesting SNDP Union to pursue the right of way over a passage having a width of 5 links along the southern boundary of the property of first respondent. Learned District Judge also found that 5th appellant was cited as one of the witnesses in the witness schedule filed by defendants, though he was not examined. Learned District Judge also found from the records that there was proper publication of

notice as provided under Order I Rule 8 of the Code. Learned District Judge also found that materials indicate that appellants were aware of the suit and the decree much earlier and in such circumstances, there is no reason to condone the delay of 1157 days. In the light of the discussions made by learned District Judge, the conclusion arrived at and that too on the records there is no reason to interfere with the order. At any rate, I do not find any substantial question of law involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.